

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROCHE DIAGNOSTICS CORPORATION,)
ROCHE DIAGNOSTICS OPERATIONS, INC.,)
and CORANGE INTERNATIONAL LTD.,)

Plaintiffs,)

vs.) Civil Action No. 1:04-CV-00358-LJM-VSS

APEX BIOTECHNOLOGY CORP.,)
HYPOGUARD USA, INC., MEDLINE)
INDUSTRIES, INC., and HOME)
DIAGNOSTICS, INC.,)

Defendants.)

ROCHE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS
CREATED AFTER THE FILING DATE OF THE LAWSUIT

The Plaintiffs, Roche Diagnostics Corporation, Roche Diagnostics Operations, Inc., and Corange International, Ltd. (collectively, "Roche"), respectfully move the Court, pursuant to Fed. R. Civ. P. 26 and 37, to order Defendants Apex Biotechnology Corporation, Hypoguard, U.S.A., Inc., and Medline Industries, Inc. ("Apex Defendants") and Defendant Home Diagnostics, Inc. ("HDI") (collectively, "Defendants") to produce any and all non-privileged documents responsive to Roche's requests that were created after the date Roche's Complaint was filed. In support of this motion, Roche shows the Court:

1. Roche filed its Complaint in this case on February 20, 2004. Among other things, the Complaint alleges that "[i]f the Defendants continue to sell the infringing products after their receipt of this Complaint, the infringement will be willful at least thereafter." Complaint, ¶ 46. The defendants are continuing to sell their accused products.

2. Roche served its First Set of Interrogatories and First Request for Production of Documents and Things to the Apex Defendants on April 22, 2004. Among other things, the Requests for Production sought “[a]ll documents and things concerning the . . . infringement of the patents in suit, including . . . all documents concerning any opinion, analysis or investigation of the . . . infringement of the patents in suit . . . (Request 4) and “[a]ll documents and things concerning the creation, design, research, development, analysis, testing or manufacture of the accused products. . . . (Request 11).

3. The Apex Defendants served written responses to Roche’s initial discovery on June 17, 2004, including the following General Objection No. 20:

20. Defendant objects to each and every interrogatory, definition and instruction to the extent the interrogatory, definition or instruction seeks information or documents dated after February 20, 2004, the filing date of this action.

4. Thereafter the parties unsuccessfully attempted to resolve the issue through correspondence. Roche raised this issue during the November 9, 2004 status conference before Magistrate Judge Shields. After a discussion between counsel for Roche and counsel for the Apex Defendants, Judge Shields determined that this issue was ripe for a motion to compel. *See* Entry on November 10, 2004.

8. Roche served its First Set of Interrogatories and First Request for Production of Documents and Things to HDI on April 26, 2004. The requests included the same requests served on the Apex Defendants. HDI served written responses on May 26. In its written responses, HDI did not object to producing documents created after the filing date. However, following the November 9 status conference, counsel for Roche wrote HDI’s counsel to confirm whether or not HDI had, like Apex Defendants, withheld documents created after the filing date of the Complaint. HDI’s counsel responded that HDI had withheld documents on this basis.

9. As demonstrated in the accompanying Memorandum, the filing of a complaint is not a cut-off date for relevance. This is especially true given the defendants' continuing infringement of Roche's patents and Roche's allegation that continued infringement after receipt of Roche's Complaint is willful. Defendants must produce all non-privileged, responsive documents, whether those documents were created before or after Roche filed its Complaint.

WHEREFORE, the Plaintiffs respectfully move the Court, pursuant to Fed. R. Civ. P. 26 and 37, to order the Defendants to produce any and all non-privileged documents responsive to Roche's requests that were created after the date Roche's Complaint was filed up to the date these documents are produced and to award Roche all other just and proper relief.

Respectfully submitted,

s/Lynn C. Tyler

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing was filed electronically this 21st day of February, 2004. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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